DRAFT
FOR NEGOTIATION PURPOSES ONLY
SUBJECT TO FURTHER GOVERNMENT REVIEW

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF THE LOWER LEY CREEK OPERABLE UNIT OF THE ONONDAGA LAKE SUPERFUND SITE Onondaga County, New York [insert Respondents]	ADMINISTRATIVE ORDER ON CONSENT FOR REMEDIAL DESIGN CERCLA Docket No.02-2015-2006 Respondents Proceeding under Sections 104, 106, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606, 9607, and 9622.

ADMINISTRATIVE ORDER ON CONSENT FOR REMEDIAL DESIGN

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and [insert Respondents] (collectively "Respondents"). This Settlement Agreement provides that Respondents shall undertake a Remedial Design ("RD"), including various pre-RD activities, to produce a detailed set of plans and specifications for implementation of the remedy selected in EPA's September 30, 2014 Record of Decision for the Lower Ley Creek Operable Unit ("Lower Ley Creek OU") of the Onondaga Lake Superfund Site ("Site") in Onondaga County, New York. In addition, Respondents shall reimburse the United States for certain past and future response costs that it incurs, as provided herein.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9604, 9606, 9607, and 9622. This authority was delegated to the EPA Administrator by Executive Order 12580 (52 *Fed. Reg.* 2923, Jan. 29, 1987). This authority was further delegated to the Regional Administrators of EPA by EPA Delegation Nos. 14-14-C and 14-14-D, respectively, and redelegated within Region 2 to the Director of the Emergency and Remedial Response Division by Regional Order No. R-1200, dated November 23, 2004.

3. EPA and Respondents recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement Agreement do not constitute an admission of any liability, or an admission as to the Findings of Fact or Conclusions of Law and Determinations set forth in Section IV and V, below. Respondents retain the right to controvert in any subsequent proceeding other than a proceeding to implement or enforce this Settlement Agreement the validity of the findings of fact, conclusions of law, and determinations in Section IV and V of this Settlement Agreement. Respondents agree to undertake all actions required by the terms and conditions of this Settlement Agreement and also agree not to contest the validity or terms of this Settlement Agreement in any action to enforce its provisions.

4. The objectives of EPA and Respondents in entering into this Settlement Agreement are to perform the design of a response action for the Lower Ley Creek OU, reimburse EPA's response costs, and resolve the claims of EPA against Respondents as provided in this Settlement Agreement.

5. In accordance with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"), and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New York (the "State") on November 18, 2014 and the Onondaga Nation on ____of negotiations with potentially responsible parties regarding the implementation of the remedial design for the Lower Ley Creek OU.

6. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the federal natural resource trustees on _____, 20__ of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustees to participate in the negotiation of this Settlement Agreement.

II. PARTIES BOUND

7. This Settlement Agreement applies to and is binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Settlement Agreement. The signatories to this Settlement Agreement certify that they are authorized to execute and legally bind the parties they represent.

8. Respondents are jointly and severally liable for carrying out all activities required by this Settlement Agreement. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Settlement Agreement, the remaining Respondents shall complete all such requirements.

9. Respondents shall provide a copy of this Settlement Agreement to all contractors, subcontractors, laboratories, and consultants that are retained to conduct any Work, as defined below, to be performed under this Settlement Agreement, within fourteen (14) days after the Effective Date of this Settlement Agreement or after the date of such retention. Respondents shall condition any such contracts upon satisfactory compliance with this Settlement Agreement, and all applicable laws and regulations. Notwithstanding the terms of any contract, Respondents are responsible for compliance with this Settlement Agreement and for ensuring that their employees, contractors, consultants, subcontractors, and agents comply with this Settlement Agreement.

III. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Settlement Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or its implementing regulations. Whenever terms listed below are used in this Settlement Agreement, in the documents attached to this Settlement Agreement, or incorporated by reference into this Settlement Agreement, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or

federal holiday, this period shall run until the close of business of the next working day.

c. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXX (Effective Date and Subsequent Modification).

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

e. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports, and other items pursuant to this Settlement Agreement, including verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph __ (costs and attorneys' fees and any monies paid to secure access, including the amount of just compensation) and Paragraph __ (Work Takeover).

f. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. Part 300, including any amendments thereto.

h. "NYSDEC" shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State, defined below.

i. "Paragraph" shall mean a portion of this Consent Settlement Agreement identified by an Arabic numeral.

j. "Past Response Costs shall mean all costs pertaining to the Lower Ley Creek OU paid by EPA through _____, 201__ plus Interest on all such costs through such date.

k. "Performance Standards" shall mean the cleanup standards and Remedial Action Objectives and other measures of achievement of the goals of the Remedial Action set forth in the 2014 ROD, defined below, and Section __ of the RD SOW attached hereto as Appendix A.

l. "Record of Decision" or "2014 ROD" shall mean the EPA Record of Decision dated September 30, 2014 by which the Director of the Emergency Remedial Response Division, EPA Region 2,selected a remedy for the Lower Ley Creek OU, including all attachments thereto, attached hereto as Appendix B.

m. "Remedial Action" or "RA" shall mean those activities performed to implement the remedy selected in the 2014 ROD, except for operation and maintenance activities which are required to maintain the effectiveness of the implemented remedy, in accordance with the final Remedial Design.

n. "Remedial Design" or "RD" shall mean those activities to be undertaken by Respondents to develop the final plans and specifications for the Remedial Action for the Lower Ley Creek OU pursuant to the RD Work Plan, as defined below.

o. "Remedial Design Work Plan" or "RD Work Plan" shall mean the document developed pursuant to Section __ of the RD SOW and approved by EPA, and any amendments thereto.

p. "Remedial Design SOW" or "RD SOW" shall mean the Statement of Work for the remedial design of the Lower Ley Creek OU, attached hereto as Appendix A.

q. "Respondents" shall mean ___.

r. "Section" shall mean a portion of this Settlement Agreement identified by an upper-case Roman numeral and includes one or more Paragraphs.

s. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto. In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

t. "Site" shall mean the Onondaga Lake Superfund Site in Onondaga County, New York.

u. "State" shall mean the State of New York.

v. "United States" shall mean the United States of America.

w. "Waste Material" shall mean (i) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (ii) any "pollutant or contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (iii) any "solid waste" under Section 1004(27) of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6903(27).

x. "Work" shall mean all activities that Respondents are required to perform under this Settlement Agreement, except those required by Section XIII (Record Retention).

IV. FINDINGS OF FACT

11. The Site, which includes Onondaga Lake itself, six major and minor tributaries and various upland sources of contamination, was placed on EPA's National Priorities List ("NPL") on December 16, 1994. EPA has, to date, organized response activities for the Site into operable units. The Lower Ley Creek OU became part of the Site in 2009.

12. The Lower Ley Creek OU consists of the lower two miles of Ley Creek (including the Creek channel and adjacent floodplains) beginning at and including the Route 11 bridge (a.k.a. Brewerton Road Bridge) and ending downstream where it empties into Onondaga Lake ("Lake"). The Lower Ley Creek OU also includes a 3.7-acre wetland situated on the southern bank of the Creek adjacent to the Cooper/Crouse-Hinds North Landfill and "Old Ley Creek Channel," an original section of the Creek before Ley Creek was widened and its path was reconfigured during a flood control project in the 1970s. Beginning in 1970, the Onondaga County Department of Drainage and Sanitation widened, deepened, and rerouted the Creek through the Town of Salina Landfill to address poor channel conditions that had historically caused extensive flooding. In addition, the Lower Ley Creek OU includes several sections along the banks of the Creek where dredged contaminated sediments were placed during that flood control project.

13. Several entities have owned property or operated facilities near Ley Creek and its branches since the late 19th and early 20th centuries. The industrial nature of this area influenced this OU and contributed to its current condition. Included among those entities are the following: Cooper/Crouse Hinds, Syracuse China, Carrier Corporation, Niagara Mohawk, Plaza East, National Plating, Town of Salina, Onondaga County, City of Syracuse, and General Motors Corporation.

14. There are a number of upland sources that have contributed contamination to Ley Creek, including, the General Motors Inland Fisher Guide Facility/Ley Creek Deferred Media subsite; Ley Creek PCB Dredgings subsite; and Salina Landfill subsite, which are also part of the Site.

15. On October 30, 2009, EPA sent general notice letters to Cooper/Crouse-Hinds, National Grid (on behalf of Niagara Mohawk), Town of Salina, Onondaga County, General Motors, Carrier, Oberdorfer, and Syracuse China informing them that EPA considered them to be PRPs at the Lower Ley Creek OU and to determine whether they would conduct or fund a remedial investigation and feasibility study ("RI/FS") for the Lower Ley Creek OU.

16. Because none of the PRPs agreed to perform the RI/FS, EPA conducted the field investigations at the Lower Ley Creek OU from 2009 through 2011, which culminated in the completion of an RI/FS report in January 2014.

17. On June 1, 2009, General Motors Corporation ("GM") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On November 28, 2009, the United States filed a timely proof of claim asserting environmental liabilities against the GM, including claims for environmental liability at the Lower Ley Creek OU. On June 29, 2012, the United States Bankruptcy Court for the Southern District of New York approved a settlement agreement resolving the United States' claims against GM at the Lower Ley Creek OU. Pursuant to that settlement, the United States, on behalf of EPA, received an allowed general unsecured claim totaling $38,344,177. Ultimately, EPA received $__ from this settlement, which was put into the special account for the Lower Ley Creek OU.

18. On September 30, 2014, EPA issued a record of decision ("2014 ROD") wherein it selected a remedy to address soil and sediment contamination at the Lower Ley Creek OU and which included the following components:

a. Excavation of PCB-contaminated soils located along the upland areas adjacent to the Creek to meet soil cleanup objectives;

b. Excavation of PCB-contaminated sediment within the Creek exceeding sediment criteria;

c. Excavation of PCB-contaminated sediment from the adjacent wetlands to meet sediment criteria;

d. Transport of the excavated contaminated soils and sediments containing greater than 50 milligrams per kilogram (mg/kg) of PCBs to a Toxic Substances Control Act ("TSCA")-compliant facility;

e. Transport of those soils and sediments which fail Toxic Characteristic Leaching Procedure testing and are determined to be characteristic hazardous waste and are non-TSCA waste (*i.e.,* less than 50 mg/kg PCBs) to an off-site, Resource Conservation and Recovery Act ("RCRA")-compliant facility;

f. Proper disposal of those soils and sediments that are not TSCA-regulated (less than 50 mg/kg of PCBs) and are not characteristic hazardous waste at a local disposal facility, if available. If a local disposal facility is not a feasible option, these soils and sediments will be transported to a non-local facility for disposal;

g. The excavated wetland areas will be backfilled with soil that meets the unrestricted soil cleanup objectives;

h. Excavated soil areas will be restored with clean substrate and vegetation consistent with an approved habitat restoration plan;

i. Habitat restoration of Ley Creek will include the placement of at least one foot of substrate similar to the existing sediments over disturbed areas and restoration of vegetation;

j. Institutional controls in the form of environmental easements/restrictive covenants will be filed in the property records of Onondaga County that will, at a minimum, restrict the use of the properties within the Lower Ley Creek OU to commercial and industrial uses and restrict intrusive activities in areas where residual contamination remains above unacceptable, risk-based levels unless the activities are in accordance with an EPA-approved Site Management Plan ("SMP");

k. Development of an SMP that will provide for the proper management of all post-construction remedy components.

l. Performance of a detailed hydrologic analysis to determine the effect of the remedy on stream flow, flooding, and dynamics and to identify the appropriate materials and bathymetry for restoration and long-term sustainability;

m. Performance of a Phase 1 Cultural Resources Survey to document the Lower Ley Creek OU's historic resources; and

n. Capping of contaminated soil and sediment areas which are determined to be areas that cannot be safely excavated to ensure protectiveness.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

19. The Lower Ley Creek OU is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

20. The contamination found at the Lower Ley Creek OU, as identified in the Findings of Fact above, includes hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

21. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

22. Respondents **[insert corporate respondents]** are corporations and therefore are "persons" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

23. Respondents **[insert govt respondents]** are political subdivisions of the State and therefore are "'persons" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

24. Each Respondent is a responsible party as defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is subject to this Settlement Agreement under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). Respondents are jointly and severally liable for performance of response action under this Settlement Agreement and for reimbursement of Past Response Costs and Future Response Costs to be incurred at the Lower Ley Creek OU.

25. Respondents have discussed with EPA the basis for this Settlement Agreement and its terms.

26. In accordance with Section 126 of CERCLA, 42 U.S.C. § 9626, and pursuant to Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments, November 2000) and the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), EPA has determined that consultation with the Onondaga Nation related to the Work is required under this Settlement Agreement.

VI. ORDER

27. Based upon the foregoing the Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record for the 2014 ROD, it is hereby ordered and agreed that Respondents shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

VII. DESIGNATED PROJECT MANAGER AND COORDINATOR

28. Within ten (10) days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions required by Respondents pursuant to this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on-site, or readily available, during performance of the Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within ten (10) days following EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by all Respondents.

29. Respondents shall retain one or more contractor(s) to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within thirty (30) days of the Effective Date. Respondents shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least ten (10) days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor, Respondents shall propose a different contractor and shall notify EPA of that contractor's name and qualifications within ten (10) days of EPA's disapproval. With respect to any contractor

proposed to be Supervising Contractor, Respondents shall demonstrate that the proposed contractor has a quality system that complies with the Uniform Federal Policy for Implementing Quality Systems ("UFP-QS"), (EPA/505/F-03/001, March, 2005), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). EPA will issue a notice of disapproval or an authorization to proceed. Any decision not to require submission of the contractor's QMP should be documented in a memorandum from the EPA remedial project manager ("RPM") and Regional Quality Assurance personnel to the Lower Ley Creek OU file.

30. EPA has designated Pam Tames of EPA Region 2's Emergency and Remedial Response Division as its RPM. Except as otherwise provided in this Settlement Agreement, Respondents shall direct all submissions required by this Settlement Agreement to her at:

Pam Tames, P.E.
U.S. EPA, Region 2
290 Broadway, 20th Floor
New York, NY 10007
[HYPERLINK "mailto:tames.pam@epa.gov"].

31. EPA's RPM shall have the authority lawfully vested in a RPM by the NCP. In addition, EPA's RPM shall have the authority, consistent with the NCP, to halt any Work required by this Settlement Agreement and to take any necessary response action when the RPM determines that conditions at the Lower Ley Creek OU may present an immediate endangerment to public health, welfare, or the environment. The absence of the RPM from the area under study pursuant to this Settlement Agreement shall not be cause for the stoppage or delay of Work.

32. EPA and Respondents shall have the right, subject to Paragraph __, to change their respective designated Project Coordinator and RPM. Respondents shall notify EPA __ days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

33. Respondents shall perform all action necessary to implement the SOW, which is incorporated into and an enforceable part of this Settlement Agreement. Respondents shall perform the Work in accordance with the schedules, standards, specifications, and other requirements of the Pre-Design Investigation ("PDI") Work Plan (hereinafter, "PDI Work Plan"), the RD Work Plan, and any other deliverables of the SOW, both as initially approved by EPA and as they may be amended or modified by EPA prior to completion of the RD, and shall comply with all other requirements of this Settlement Agreement. The funding of the Work shall be entirely provided by Respondents, but EPA agrees to negotiate in good faith the potential reimbursement of some or all of the cost of performing the Work during any future negotiation for the implementation of the remedy being designed pursuant to this Settlement Agreement, subject to availability of sufficient funds in the special account for this OU, the willingness of some or all of Respondents to implement the remedy, and any other relevant considerations at that time.

34. Emergency Response and Notification of Releases.

a. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Lower Ley Creek OU that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action to prevent, abate, or minimize such release or endangerment caused or threatened by the release. Respondents shall take these actions in accordance with all applicable provisions of this Settlement Agreement and SOW, including, but not limited to, the Health and Safety Plan. Respondents shall also immediately notify the EPA RPM at (212) 637-4255 or, in the event of her unavailability, Respondents shall immediately notify her supervisor, the Chief of the Central New York Remediation Section, at (212) 637-4258, of the incident or conditions at the OU. If neither of these persons is available, Respondents shall notify the EPA Response and Prevention Branch, Emergency and Remedial Response Division, Region 2, at (732) 548-8730. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, these costs incurred by EPA shall fall within the definition of Future Response Costs, and Respondents shall reimburse EPA of those costs which are not inconsistent with the NCP pursuant to Section XIX (Payment of Response Costs).

b. Nothing in the preceding subparagraph shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Lower Ley Creek OU.

c. Upon the occurrence of any event during performance of the Work required hereunder which, pursuant to Section 103 of CERCLA, requires reporting to the National Response Center, telephone number 1-800-424-8802, Respondents shall also immediately orally notify the EPA RPM at (212) 637-4248 or, in the event of her unavailability, Respondents shall immediately notify her supervisor, the Chief of the Central New York Remediation Section at (212) 637-4258 of the incident or conditions at the OU in addition to the reporting required by Section 103 of CERCLA, 42 U.S.C. § 9603. Within fourteen (14) days of the onset of such an event, Respondents shall also furnish EPA with a written report setting forth the events which occurred and the measures taken, and to be taken, in response thereto. The reporting requirements of this subparagraph are in addition to, not in lieu of, reporting under Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004.

IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

35. After review of any plan, report, or other item that is required to be submitted for approval pursuant to this Settlement Agreement, in a notice to Respondents, EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Respondents at least one notice of deficiency and an opportunity to cure within thirty (30) days or other time frame as determined by EPA, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved because of material defects.

36. In the event of approval, approval upon conditions, or modification by EPA, pursuant to subparagraphs __ (a), (b) or (c) above, Respondents shall proceed to take any action required by the plan, report, or other deliverable, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XVI (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, Respondents shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph __ and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XVIII (Stipulated Penalties).

37. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph __, Respondents shall, within thirty (30) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XVIII, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified because of a material defect as provided in Paragraphs __ and __.

b. Notwithstanding the receipt of a notice of disapproval, Respondents shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XVIII (Stipulated Penalties).

c. Respondents shall not proceed further with any subsequent activities or tasks until receiving EPA approval, approval on condition, or modification of the PDI deliverables and the RD Work Plan. While awaiting EPA approval, approval on condition, or modification of either of these deliverables, Respondents shall proceed with other tasks and activities that may be conducted independently of

these deliverables, in accordance with the schedules set forth under this Settlement Agreement.

d. For all remaining deliverables not listed above in Subparagraph [REF _Ref366571487 \w \h * MERGEFORMAT], Respondents shall proceed with all subsequent tasks, activities, and deliverables without awaiting EPA approval on the submitted deliverable. EPA reserves the right to stop Respondents from proceeding further, either temporarily or permanently, on any task, activity, or deliverable at any point.

38. If EPA disapproves a resubmitted plan, report, or other deliverable, or portion thereof, EPA may again direct Respondents to correct the deficiencies. EPA also retains the right to modify or develop the plan, report, or other deliverable. Respondents shall implement any such plan, report, or deliverable as corrected, modified, or developed by EPA, subject only to Respondents' right to invoke the procedures set forth in Section XVI (Dispute Resolution).

39. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA because of a material defect, Respondents shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately, unless EPA, in its sole discretion, authorizes that a further resubmission is appropriate or Respondents invoke the dispute resolution procedures in accordance with Section XVI (Dispute Resolution) and EPA's disapproval is revoked or substantially modified pursuant to a Dispute Resolution decision issued by EPA or superseded by an agreement reached pursuant to that Section. The provisions of Section XVI (Dispute Resolution) and Section XVIII (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified, or superseded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XVI, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVIII.

40. In the event that EPA takes over some of the tasks, Respondents shall incorporate and integrate information supplied by EPA into the final reports.

41. All plans, reports, and other deliverables submitted to EPA under this Settlement Agreement shall, upon approval or modification by EPA, be incorporated into and enforceable under this Settlement Agreement. In the event EPA approves or modifies a portion of a plan, report, or other deliverable submitted to EPA under this Settlement Agreement, the approved or modified portion shall be incorporated into and become enforceable under this Settlement Agreement.

X. SUBMISSION OF PLANS AND REPORTING REQUIREMENTS

42. Reporting

a. Respondents shall submit written progress reports to EPA concerning actions undertaken pursuant to this Settlement Agreement and pursuant to the schedules provided in the SOW until termination of this Settlement Agreement, unless otherwise directed in writing by EPA.

b. Respondents shall submit electronic copies of all plans, reports, or other submissions required by this Settlement Agreement, the SOW, or any approved work plans as set forth below. All electronic submissions must be in a format that is compatible with EPA software and in database files and sizes to be specified by EPA. Reports should be submitted to the following:

Pam Tames, P.E.
Emergency and Remedial Response Division
U.S. Environmental Protection Agency Region 2
tames.pam@epa.gov

Lauren Charney
Office of Regional Counsel
United States Environmental Protection Agency Region 2
charney.lauren@epa.gov

Richard Mustico, P.E.
New York State Department of Environmental Conservation
[HYPERLINK "mailto:richard.mustico@dec.ny.gov"]

Alma Lowry
Law Office of Joseph Heath
[HYPERLINK "mailto:alowry@hamilton.edu"]

In addition to an electronic submission, the final design document shall also be submitted in hard copy to:

Pam Tames, P.E.
Emergency and Remedial Response Division
U.S. Environmental Protection Agency Region 2
290 Broadway, 20th Floor
New York, New York 10007
Attention: Lower Ley Creek Remedial Project Manager

XI. SITE ACCESS

43. If any Respondent owns or controls any part of the Lower Ley Creek OU, or any other property where access is needed to implement this Settlement Agreement, such Respondent shall, commencing on the Effective Date, provide EPA and its representatives, including contractors, with access at all reasonable times to the Lower Ley Creek OU, or such other property, to conduct

any activity related to this Settlement Agreement. Respondents who own or control property at the Lower Ley Creek OU shall, at least thirty (30) days prior to the conveyance of any interest in real property at the Lower Ley Creek OU, give written notice to the transferee that the property is subject to this Settlement Agreement and written notice to EPA of the proposed conveyance, including the name and address of the transferee. Respondents also agree to require that their successors comply with the immediately preceding sentence, this Section, and Section XII (Access to Information).

44. Where any action under this Settlement Agreement is to be performed in areas owned by, or in possession of, someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within thirty (30) days after the Effective Date, or as otherwise specified in writing by EPA. Respondents shall immediately notify EPA if, after using their best efforts, they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Any costs incurred by EPA in obtaining access shall fall within the definition of Future Response Costs, and Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

45. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

46. If Respondents cannot obtain access agreements, EPA may obtain access for Respondents, perform those tasks or activities with EPA contractors, or terminate this Settlement Agreement. If EPA performs those tasks or activities with EPA contractors and does not terminate this Settlement Agreement, Respondents shall perform all other activities not requiring access to such property. Any costs incurred by EPA in performing these activities shall fall within the definition of Future Response Costs, and Respondents shall reimburse EPA for all costs incurred in performing such activities. Respondents shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables.

XII. ACCESS TO INFORMATION

47. Respondents shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Lower Ley Creek OU or to the implementation of Work pursuant to this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

48. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. §

2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to EPA, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents. Respondents shall segregate and clearly identify all documents or information submitted under this Settlement Agreement for which Respondents assert business confidentiality claims.

49. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege in lieu of providing documents, they shall provide EPA with the following: a) the title of the document, record, or information; b) the date of the document, record, or information; c) the name and title of the author of the document, record, or information; d) the name and title of each addressee and recipient; e) a description of the contents of the document, record, or information; and f) the privilege asserted by Respondents. However, no documents, reports, or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

50. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at, or around, the Lower Ley Creek OU.

XIII. RECORD RETENTION

51. During the pendency of this Settlement Agreement and until 10 years after Respondents' receipt of EPA's notification that work has been completed, each Respondent shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Lower Ley Creek OU, regardless of any corporate retention policy to the contrary. Until ten (10) years after notification that work has been completed, Respondents shall also instruct their contractors and agents to preserve all documents, records, and other information of whatever kind, nature, or description relating to performance of the Work.

52. At the conclusion of this document retention period, Respondents shall notify EPA at least ninety (90) days prior to the destruction of any such documents, records, or other information and, upon request by EPA, Respondents shall deliver any such documents, records, or other information to EPA. Consistent with the requirements set forth in Paragraph ___, above, Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law.

53. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information (other than identical copies) relating to its

potential liability regarding the Lower Ley Creek OU since notification of potential liability by EPA or the State or the filing of suit against it regarding the Lower Ley Creek OU, and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XIV. COMPLIANCE WITH OTHER LAWS

54. Respondents shall undertake all action that this Settlement Agreement requires in accordance with the requirements of all applicable local, state, and federal laws and regulations, unless an exemption from such requirements is specifically provided by law or in this Settlement Agreement. The activities conducted pursuant to this Settlement Agreement, if approved by EPA, shall be considered consistent with the NCP.

55. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and the NCP, no permit shall be required for any portion of the Work conducted entirely on-site. Where any portion of the Work requires a federal or state permit or approval, Respondents shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

56. This Settlement Agreement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XV. PAYMENT OF RESPONSE COSTS

57. Respondents hereby agree to reimburse EPA for its Past Response Costs. Respondents shall remit payment of $____ in partial payment of Past Response Costs within thirty (30) days of the Effective Date of this Settlement Agreement in accordance with the payment provisions of Paragraph __, below.

58. Respondents hereby agree to reimburse EPA for Future Response Costs. EPA will periodically send billings to Respondents for Future Response Costs. The billings will be accompanied by a printout of cost data from EPA's financial management system. Respondents shall remit payment to EPA via electronic funds transfer ("EFT") within thirty (30) days of receipt of each such billing.

59. To effect payment via EFT, Respondents shall instruct their bank to remit payment in the required amount via EFT using the following information, or such other updated EFT information that EPA may subsequently provide to Respondents:

- Amount of payment
- Bank: **Federal Reserve Bank of New York**
- Account code for Federal Reserve Bank account receiving the payment: **68010727**
- Federal Reserve Bank ABA Routing Number: **021030004**
- SWIFT Address: **FRNYUS33**

33 Liberty Street
New York, NY 10045

- Field Tag 4200 of the Fedwire message should read:
  D 68010727 Environmental Protection Agency
- Name of remitter:
- Settlement Agreement Index number: **CERCLA - 02-2015-2006**
- Site/spill identifier: **024Q**

At the time of payment, Respondents shall send notice that such payment has been made by email to:

Richard Rice
Cincinnati Finance Office
U.S. Environmental Protection Agency
AcctsReceivable.CINWD@epa.gov and Rice.Richard@epa.gov

Pam Tames, Remedial Project Manager
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
Tames.pam@epa.gov

Lauren Charney
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
Charney.lauren@epa.gov

Such notice shall reference the date of the EFT, the payment amount, the "Lower Ley Creek OU of the Onondaga Lake Site" and the Settlement Agreement index number.

The total amounts to be paid by Respondents pursuant to this Paragraph shall be deposited into the Lower Ley Creek OU Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Lower Ley Creek OU, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

60. In the event that payment of Past Response Costs is not made within thirty (30) days of the Effective Date or any payments for Future Response Costs are not made within thirty (30) days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall accrue on the first day that payment is overdue and shall continue to accrue until the date of payment. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to payment of stipulated penalties pursuant to Section XVIII.

61. Respondents may contest payment of any billed Future Response Costs under Paragraph __, if they determine that EPA has made an accounting error, or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. [SEQ CHAPTER \h \r 1]Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the EPA RPM. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall, within the thirty (30)-day period, pay all uncontested Future Response Costs to EPA in the manner described in Paragraph __. Simultaneously, Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New York and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the EPA RPM a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution). If EPA prevails in the dispute, within five (5) days of the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph __. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay to EPA that portion of the costs (plus associated accrued interest) for which they did not prevail in the manner described in Paragraph __. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse EPA for Future Response Costs.

XVI. DISPUTE RESOLUTION

62. Unless this Settlement Agreement expressly provides otherwise, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

63. Notwithstanding any other provision of this Settlement Agreement, Respondents may not invoke dispute resolution procedures more than once regarding the same issue.

64. If Respondents object to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, it shall notify EPA in writing of its objection(s) within thirty (30) days of such action, or in the case of billings for Future Response Costs, within thirty (30) days of receipt of each such bill, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have twenty (20) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted verbally but must be confirmed in writing.

65. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Deputy Division Director level will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondents' obligations under this Settlement Agreement for matters not directly in dispute shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. Respondents shall proceed in accordance with EPA's final decision regarding the matter in dispute, regardless of whether Respondents agree with the decision.

XVII. FORCE MAJEURE

66. Respondents agree to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure* event. For purposes of this Settlement Agreement, a *force majeure* event is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including, but not limited to, their contractors and subcontractors, that delays or prevents performance of any obligation under this Settlement Agreement despite Respondents' best efforts to fulfill the obligation. The requirement that Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential *force majeure* event: (a) as it is occurring; and (b) following the potential *force majeure* event, such that the delay is minimized to the greatest extent possible. A *force majeure* event does not include financial inability to complete the Work or increased cost of performance.

67. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within seven (7) days of when Respondents first knew that the event might cause a delay. Within five (5) days thereafter, Respondents shall provide to EPA in writing: an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of a *force majeure* event for that event for the period of time of such failure to comply and for any additional delay caused by such failure. Respondents shall be deemed to know of any circumstance of which Respondents, any entity controlled by Respondents, or Respondents' contractors knew or should have known.

68. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of any extension for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

69. If Respondents fail to comply with any of the requirements or time limits set forth in or established pursuant to this Settlement Agreement, without prior EPA approval, and such failure is not excused under the terms of Paragraphs __ through __ above (Force Majeure), Respondents shall, upon demand by EPA, pay a stipulated penalty to EPA in the amount indicated below:

a. For all requirements of this Settlement Agreement, other than the timely provision of progress reports required by Section __ of the SOW and Paragraph __.a, stipulated penalties shall accrue in the amount of $1,000 per day, per violation, for the first seven days of noncompliance, $2,000 per day, per violation, for the 8th through 15th day of noncompliance, $4,000 per day, per violation, for the16th through 25th day of noncompliance, and $8,000 per day, per violation, for the 26th day of noncompliance and beyond.

b. For the progress reports required by Section __ of the SOW and Paragraph [REF _Ref366572567 \w \h * MERGEFORMAT], stipulated penalties shall accrue in the amount of $250 per day, per violation, for the first seven days of noncompliance, $500 per day, per violation, for the 8th through 15th day of noncompliance, $1,000 per day, per violation, for the 16th through 25th day of noncompliance, and $2,000 per day, per violation, for the 26th day of noncompliance and beyond.

70. In the event that EPA assumes performance of remaining Work pursuant to Paragraph __, Respondents shall be liable for a stipulated penalty in the amount of $250,000.

71. All penalties shall begin to accrue on the day after the complete performance is due, or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: a) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and b) with respect to a decision by the Director of the Emergency and Remedial Response Division, or his designee, under Paragraph __ of Section XVI (Dispute Resolution), during the period, if any, beginning on

the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

72. Following EPA's determination that Respondents have failed to comply with a requirement of this Settlement Agreement, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

73. Respondents shall pay EPA all penalties accruing under this Section within thirty (30 days) of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be made via EFT in accordance with the payment procedures in Paragraph __, above.

74. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement Agreement.

75. Penalties shall continue to accrue during any dispute resolution period but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

76. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph __.

77. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c) (3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX (Reservation of Rights by EPA), Paragraph __. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XIX. COVENANT NOT TO SUE BY EPA

78. In consideration of the actions that Respondents will perform and the payments that Respondents will make under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work, Past Response Costs, and for Future Response Costs. This covenant not to sue shall take effect upon receipt by EPA of payment pursuant to Paragraph __ and any Interest or Stipulated Penalties due for failure to pay such Past Response Costs as required by Sections XV and XVIII of this Settlement Agreement. This covenant not to sue is conditioned upon Respondents' complete and satisfactory performance of all obligations under this Settlement Agreement, including, but not limited to, the satisfactory performance of the Work and the payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

XX. RESERVATION OF RIGHTS BY EPA

79. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Lower Ley Creek OU. Further, except as specifically provided in this Settlement Agreement, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

80. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents to meet a requirement of this Settlement Agreement;

b. liability for costs not included within the definition of Future Response Costs and/or Past Response Costs;

c. liability for performance of response action other than the Work, including but not limited to the pre-design and design of the remedy selected in the 2014 ROD;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and

f. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site.

81. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may assume the performance of any or all portion(s) of the Work as EPA determines necessary. Respondents may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs that EPA incurs in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XV (Payment of Future Response Costs). Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENTS

82. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Past Response Costs, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b) (2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b) (2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at, or in connection with, the Lower Ley Creek OU, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or payment of Past Response Costs or Future Response Costs.

83. Respondents reserve, and this Settlement Agreement is without prejudice to, claims against the United States subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671, nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or

approval of Respondents' plans or activities. The foregoing applies only to claims that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

84. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXII. OTHER CLAIMS

85. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

86. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Settlement Agreement. Respondents expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which Respondents may have with respect to any matter, transaction, or occurrence relating in any way to the Lower Ley Creek OU against any person not a party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

87. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION PROTECTION

88. The Parties agree that this settlement constitutes an administrative settlement for purposes of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Respondents are entitled, as of the Effective Date to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, Past Response Costs and Future Response Costs. The Parties further agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B), pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work, Past Response Costs, and Future Response Costs.

XXIV. INDEMNIFICATION

89. Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, contractors, subcontractors, employees, and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondents agree to pay the United States all costs incurred by the United States, including, but not limited to, attorneys' fees and other expenses of litigation and settlement, arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into, by or on behalf of Respondents in carrying out activities pursuant to this Settlement Agreement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

90. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling any such claim.

91. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made, or to be made, to the United States, arising from, or on account of, any contract, agreement, or arrangement between Respondents and any person for performance of Work on, or relating to, the Lower Ley Creek OU, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from, or on account of, any contract, agreement, or arrangement between Respondents and any person for performance of Work on, or relating to, the Lower Ley Creek OU.

XXV. INSURANCE

92. At least seven (7) days prior to commencing any Work at the Lower Ley Creek OU, Respondents shall submit to EPA certificates demonstrating that Respondents or their contractors and subcontractors have adequate comprehensive general liability and automobile insurance coverage in the amount of $5 million or have indemnification for liabilities for injuries or damages to persons or property which may result from the activities to be conducted by or on behalf of Respondents pursuant to this Settlement Agreement. Respondents shall ensure that such insurance or indemnification is maintained for the duration of the Work required by this Settlement Agreement.

XXVI. FINANCIAL ASSURANCE

93. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security for the benefit of EPA in the amount of $ **[insert estimated cost of Work]** in one or more of the following forms, to secure the full and final completion of Work by Respondents:

a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;

b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA equaling the total estimated cost of the Work;

c. a trust fund administered by a trustee acceptable in all respects to EPA;

d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;

e. a corporate guarantee to perform the Work provided by one or more parent corporations or subsidiaries of Respondents, or by one or more unrelated corporations that have a substantial business relationship with at least one of Respondents; including a demonstration that any such company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

f. a corporate guarantee to perform the Work by one or more of Respondents, including a demonstration that any such Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

94. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondents shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph __, above. In addition, if at any time EPA notifies Respondents that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondents shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondents' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

95. If Respondents seek to ensure completion of the Work through a guarantee pursuant to Subparagraph __(e) or __(f) of this Settlement Agreement, Respondents shall: (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date, to EPA. For the purposes of

this Settlement Agreement, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the current cost estimate of $___ for the Work at the Lower Ley Creek OU shall be used in relevant financial test calculations.

96. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph __ of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondents shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA.

97. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of financial assurance required hereunder only in accordance with a final decision resolving such dispute pursuant to Section XVI (Dispute Resolution).

XXVII. INTEGRATION/APPENDICES

98. This Settlement Agreement, its appendices, and any deliverables, technical memoranda, specifications, schedules, documents, plans, or reports (other than progress reports) that will be developed pursuant to this Settlement Agreement and become incorporated into, and enforceable under, this Settlement Agreement constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement Agreement.

99. In the event of a conflict between any provision of this Settlement Agreement and the provisions of any document attached to this Settlement Agreement or submitted or approved pursuant to this Settlement Agreement, the provisions of this Settlement Agreement shall control.

100. The following documents are attached to and incorporated into this Settlement Agreement:

Appendix A is the RD SOW
Appendix B is the 2014 ROD
Appendix C is a map that generally depicts the Lower Ley Creek OU.

XXVIII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

101. This Settlement Agreement shall be effective upon receipt by counsel for Respondents after the Settlement Agreement is signed by the Director of the Emergency and Remedial Response Division or his designee.

102. This Settlement Agreement may be amended by mutual agreement of EPA and Respondents. Amendments shall be in writing and shall be effective when signed by EPA. EPA's RPM does not have the authority to sign amendments to the Settlement Agreement.

103. No informal advice, guidance, suggestion, or comment by EPA's RPM or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXIX. NOTICE OF COMPLETION OF WORK

104. When EPA determines that all Work has been fully performed in accordance with the other requirements of this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including, payment of Future Response Costs or record retention, EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the applicable work plan(s), if appropriate, to correct such deficiencies. Respondents shall implement the modified and approved work plan(s) and shall submit the required deliverables. Failure by Respondents to implement the approved modified work plan(s) shall be a violation of this Settlement Agreement.

By: _____ _____
Walter E. Mugdan, Director Date
Emergency and Remedial Response Division
EPA, Region 2